Appendix A

Before the

FEDERAL MARITIME COMMISSION

Washington, D.C.

Agreement No. T-3363 Between the City of Los Angeles and Matson Terminals, Inc.	))))	Docket No. 87-15

OFFER OF SETTLEMENT

WHEREAS, by an Order of Investigation dated June 30, 1987, the Federal Maritime Commission commenced an investigation into practices of Respondents Matson Terminals, Inc., ("Matson") and the City of Los Angeles ("the Port") to determine whether respondents had failed to comply with the terms of a preferential berth assignment known as Agreement No. T-3363 by collecting less than applicable charges for wharfage, wharf storage, dockage, wharf demurrage and other terminal charges and whether Matson and the Port (hereinafter collectively referred to as "Respondents") had thereby engaged in conduct unlawful under section 15 of the Shipping Act, 1916 and section 10(a)(3) of the Shipping Act of 1984;

WHEREAS, Respondents believe and assert that their actions were at all times lawful and consistent with the statutes and regulations administered by the Federal Maritime Commission and agreements filed with and approved by the Federal Maritime Commission, including Agreement No. T-3363;

WHEREAS, Respondents believe that there is no legal precedent or principle by which their actions could be deemed unlawful, and that Respondents' position concerning the lawfulness of their activities would prevail in the litigation of this proceeding;

WHEREAS, Respondents nevertheless believe that continued litigation in this matter will be protracted and that the costs of vindicating their position in this proceeding will be substantial;

WHEREAS, in order to avoid further expenditures of time and monies on continued litigation, Respondents are willing to tender a monetary settlement to the Federal Maritime Commission;

WHEREAS, this offer is conditioned upon the issuance of a final order that terminates and fully disposes of this proceeding and which states that any and all demands by the Commission based on violations of law or liability for penalties under the Shipping Act, 1916 or the Shipping Act of 1984, to the extent such liabilities or allegations of violations arise from or are related to the Order of Investigation or emanate from the record of this proceeding, are resolved with finality and without any admission of liability or violation of law by either Respondent; and

WHEREAS, it is understood that both Respondents expressly deny the allegations of violations set forth in the Order of Investigation and on the record of this proceeding;

WHEREAS, the Bureau of Hearing Counsel joins in this offer of settlement and urges approval of this proposed settlement;

THEREFORE, Respondents do tender the following offer of settlement:

1. That the final order in this proceeding shall become effective as to each Respondent upon payment to the Federal Maritime Commission of the following sums:

Matson Terminals, Inc.	$69,000.00
Port of Los Angeles	$46,000.00

Respondents agree to either pay or deposit these sums in an interest-bearing account not later than May 9, 1988. The amounts so deposited and all interest accrued will be payable to the Federal Maritime Commission.

2. That, upon final approval of this offer of settlement, any investigation, assessment proceeding, civil action, demand for recovery of civil penalties or any other relief or punitive actions undertaken by the Commission arising from matters set forth in the Order of Investigation or emanating from the record of this proceeding shall be forever barred as to each Respondent.

3. That the factual bases for this settlement are set forth in a Stipulation of Facts. This stipulation has been agreed to by Respondents and the Bureau of Hearing Counsel and has been submitted previously to the

Presiding Administrative Law Judge in anticipation of hearings in this proceeding. Nothing contained in the Stipulation of Facts was intended to be used against either respondent in any way in any other proceeding in this or any other forum. Therefore it is appropriate that the parties request that the initial decision direct that future use of the Stipulation of Facts be so limited.

Dated this 6th day of May, 1988

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(FEDERAL MARITIME COMMISSION)
(SERVED OCTOBER 3, 1988)
(EXCEPTIONS DUE 10-25-88)
(REPLIES TO EXCEPTIONS DUE 11-16-88)

FEDERAL MARITIME COMMISSION

DOCKET NO. 87-15

COMPLIANCE WITH AGREEMENT NO. T-3363 BETWEEN
CITY OF LOS ANGELES AND MATSON TERMINALS, INC.

Settlement of a proceeding to determine whether or not the Respondents violated section 10(a)(3) of the Shipping Act of 1984, and section 15 of the Shipping Act of 1916, by failing to comply with the terms of a filed agreement, and if so, to determine whether or not the violation was willful, whether penalties should be assessed and in what amount, approved. The Respondents are ordered to pay the respective amounts of $69,000 and $46,000, both plus accrued interest, pursuant to the terms of a settlement agreement made a part of this decision.

David F. Anderson, Stephen Todd Rudman, Sloan White, C. Jonathan Benner, Charles L. Coleman, III, and Dennis James Burnett for Respondent, Matson Terminals, Inc.

Gerald F. Swan for Respondent, City of Los Angeles.

Seymour Glanzer, Ronald D. Murphy, and Kamau S. Philbert for the Bureau of Hearing Counsel.

INITIAL DECISION[1] OF JOSEPH N. INGOLIA,
ADMINISTRATIVE LAW JUDGE

This proceeding was instituted by Order of Investigation and Hearing ("Order") served June 30, 1987, pursuant to sections 11

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[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

and 13 of the Shipping Act of 1984, 46 U.S.C. app. §§ 1710 and 1712, and section 22 of the Shipping Act, 1916, 46 U.S.C. app. § 821. The investigation was instituted to determine:

> (1) Whether the City and Matson knowingly and wilfully violated section 10(a)(3) of the Shipping Act of 1984 by failure to collect applicable Port tariff charges from common carrier customers using the container terminal granted by the City to Matson pursuant to Agreement No. T-3363;
>
> (2) Whether the City and Matson violated section 15 of the Shipping Act, 1916; and
>
> (3) Whether, in the event the City and Matson are found to have violated the above-cited provisions, civil penalties should be assessed and, if so, the amount of such penalties.

In its initial stages this proceeding encountered difficulty because not only was discovery long and troublesome, but there were several motions filed, some regarding confidentiality and some having to do with the quashing of subpoenas. Several extensions of time were necessitated, but finally hearings were set in Pasadena and San Francisco, California, beginning on April 11, 1988. The parties filed Prehearing Statements, a Joint Stipulation of Facts and Trial Briefs. On April 7, 1988, Hearing Counsel, on behalf of all parties, filed a "Motion to Cancel Hearing Schedule," which indicated that "a comprehensive basis of settlement has been reached," and also indicated that a written offer of settlement, together with supporting statements would be filed later. The Motion was granted and on May 6, 1988, an "Offer of Settlement" ("Settlement") was filed, and is hereby made a part of this decision as Appendix A. Also submitted was a Joint Memorandum in Support of the Offer of Settlement ("Joint

Memorandum") which contains not only the arguments and contentions of the parties, but copies of the Agreement involved in this proceeding including paragraph (5) which contains the language giving rise to the issues in this proceeding. While the Joint Memorandum is not incorporated in the appendix to this decision because of its length, portions of it are set forth in the decision where necessary as are portions of a "Supplemental Stipulation" which will be discussed later.

Facts

The parties have jointly stipulated the following facts and they are so found:

A. The Parties

1. The Port of Los Angeles is an independent department of the City of Los Angeles. The activities of the Port are overseen by a five-member Board of Harbor Commissioners and an Executive Director.

2. Matson Terminals, Inc. ("Matson") is a wholly-owned subsidiary of Matson Navigation Company, Inc. ("Matson Navigation"). Matson Navigation is a common carrier operating an exclusively domestic service in the offshore trades between the continental United States and Hawaii. Matson's main source of business is the provision of terminal services and facilities for its corporate parent. However, Matson also provides terminal services to vessel operators in the foreign trades of the United States. Matson is a Hawaii Corporation headquartered in San

Francisco, California. Matson is an "other person" within the meaning of the Shipping Act, 1916, and a marine terminal operator within the meaning of the Shipping Act of 1984.

B. The Operations of the Port of Los Angeles

3. The Port owns land and marine terminal facilities in Los Angeles Harbor. The Port refers to itself as a "landlord port." In other words, the Port does not itself directly operate terminal facilities in the port area, but rather enters into arrangements with terminal operators to operate the several facilities in the port area. The Port rents, leases, licenses and assigns its facilities to marine terminal operators, stevedores, and other private operators. For purposes of this proceeding, the Port is an "other person" within the meaning of the Shipping Act, 1916, and a marine terminal operator within the meaning of the Shipping Act of 1984.

4. The Port's rental, lease, licensing, and assignment agreements are routinely filed with the Commission. These agreements specify the terms and conditions governing the use and operation of terminal facilities at the Port, and state the compensation that the Port is entitled to receive from its permittees as payment for the use of the property administered by the Port.

5. The Port published Port of Los Angeles Tariff No. 3 ("Port Tariff") naming rates, charges rules and regulations at Los Angeles Harbor. The Port Tariff includes rates for wharfage, dockage, wharf storage and wharf demurrage. The Port Tariff was,

at all times relevant to this proceeding, on file with the Federal Maritime Commission.

C. The Operations of Matson Terminals, Inc.

6. Matson operates marine terminal facilities in the ports of Honolulu, Seattle, Oakland and Los Angeles.

7. In Los Angeles, Matson operates at Berths 206-209 pursuant to a preferential berth assignment[2] granted by the Port. That preferential berth assignment is memorialized in an agreement (Agreement No. T-3363 and amendments thereto) and has at all times relevant to this proceeding been on file with the Federal Maritime Commission.

8. During all or part of the period,[3] the following ocean common carriers called regularly at Matson's Los Angeles marine terminal:

(a) Matson Navigation Company, Inc.
(entire period)

(b) Nippon Yusen Kaisha ("N.Y.K.")
(entire period)

(c) Showa Line, Ltd. ("Showa")
(entire period)

(d) Korea Marine Transport Company ("KMTC")
(July 8, 1984 to September 1984)

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[2] Because this document conveys to Matson the right to enter upon and use real property controlled by the Port, it is frequently referred to by Matson and the Port as a "terminal lease" or the "lease agreement."

[3] The period referred to is from July 1, 1982, to May 15, 1987.

N.Y.K., Showa and KMTC were all ocean common carriers operating in the foreign commerce of the United States.

D. Agreements Between Matson Terminals, Inc. and the Port

9. Commencing in 1969, the use of Port facilities by Matson has been governed by two agreements and their amendments. These agreements were filed with and approved by the Federal Maritime Commission.

10. In chronological order, the agreements (and their amendments) between Matson and the Port in effect through May 15, 1987, are:

(a) Agreement No. T-2356, dated October 29, 1969;

(b) Agreement No. T-2356-1, dated December 17, 1975;

(c) Agreement No. T-2356-2, dated June 15, 1976;

(d) Agreement No. T-2356-3, dated December 1, 1976;

(e) Agreement No. T-3363, dated February 1, 1977;

(f) Agreement No. T-3363-1, dated December 15, 1980;

(g) Agreement No. T-3363-2, dated December 15, 1981.

The parties operated pursuant to Agreement No. T-3363-2 between December 15, 1981 and May 15, 1987. Between February 1, 1986 and May 15, 1987, the compensation provisions of Agreement No. T-3363-2 remained in effect pursuant to the holdover provisions of the basic agreement.

E. Agreements Between Matson Terminals and its Customers

11. Matson entered into written agreements with each of the common carriers regularly calling at its Los Angeles terminal.

These agreements addressed the terms and conditions of certain marine terminal and stevedoring services to be provided by Matson to these carriers.

12. The following written agreements between Matson and its carrier customers were filed with and approved by the Commission:

(a) Agreement No. T-2737, dated January 16, 1973, between Matson and Matson Navigation;

(b) Agreement No. T-3916, dated July 7, 1980, between Matson and Matson Navigation;

(c) Agreement No. T-4168, dated February 1, 1984, between Matson and N.Y.K.;

(d) Agreement No. T-2649, dated May 24, 1972, between Matson and N.Y.K.;

(e) Agreement No. T-4167, dated February 1, 1984, between Matson and Showa;

(f) Agreement No. T-2650, dated May 24, 1972, between Matson and Showa;

(g) Agreement No. T-4143, dated September 22, 1983, between Matson and KMTC; and

(h) Agreement No. T-3737, dated October 17, 1978, between Matson and N.Y.K. as agent for KMTC.

F. Practices of Matson and the Port

13. Matson maintains a terminal tariff on file with the F.M.C. This tariff (Terminal Tariff No. 8, FMC-T No. 2) states rates and rules applicable either solely or primarily to breakbulk and automobile cargoes with immediate prior or immediate subsequent movement on Matson Navigation vessels. These rates are identical to those expressed for the same commodities in the Port's tariff.

14. Since the effective date of Agreement No. T-3363, the Port has billed Matson's customers directly for tariff charges. The Port has collected from Matson's customers only those amounts which were due to the Port from Matson as compensation under the Agreement No. T-3363. The details of this practice, as applied to particular charges, are described in the following paragraphs. If late charges were owed, the Port directly billed Matson's customers for the late charges and obtained payment from those customers.

15. Dockage and Wharfage: Except as set forth in item 20, below, dockage and wharfage charges were invoiced directly to Matson's customers or their agents by the Port. The invoices submitted to the carriers (or their agents) stated the Port's total gross tariff charges for dockage and wharfage and then deducted amounts which represented Matson's revenue-sharing percentage. These deductions were designated as revenue-sharing discounts and were equal to amounts of tariff charges to be retained by Matson under the agreement. A typical invoice from the Port to a carrier customer of Matson would state a gross amount (i.e., Port's tariff charges) for wharfage and dockage, and would also state a line item subtracting from the gross amount an amount representing revenue sharing and would enter a net amount representing the Port's compensation as provided for in the Agreement. Matson's customers would pay the net amount to the Port.

16. An exception to this invoicing practice was the Port's invoices to Showa. Prior to September 12, 1985, Showa invoices

were handled the same as invoices to other carriers. However, on or around September 13, 1985, these procedures changed. The Port at that time began to invoice Matson directly for dockage and wharfage charges incurred by Showa vessels, minus the revenue-sharing percentage accruing to Matson under the agreement. Matson would then forward the invoices to Showa. Showa remitted to Matson the Port's compensation which was the net amount stated in the invoices. Matson then remitted the net invoice amounts to the Port.

17. Wharf Demurrage: Matson collected demurrage charges in accordance with its customers' tariff rates from the draymen before releasing containers at the terminal gate. A Matson employee prepared a demurrage report to the Port. Matson paid to its customers the money it collected in demurrage charges. The Port invoiced Matson's customers for demurrage charges at the rate provided in its tariff, minus the revenue-sharing percentage accruing to Matson under Agreement No. T-3363. The customers paid the invoice amounts directly to the Port.

18. Again, an exception to this invoicing practice was the Port's invoices to Showa for demurrage after September 13, 1985. On or around September 13, 1985, the Port began to invoice Matson directly for demurrage charges for containers carried aboard Showa vessels, minus the revenue-sharing percentage accruing to Matson. Matson would then forward the invoices to Showa. Showa remitted to Matson the net amounts stated in the invoices (i.e., the Port's compensation). Matson then remitted the same net invoice amounts to the Port.

19. Wharf Storage: Storage charges were invoiced and collected by the Port directly from Matson's customers. The storage charges were invoiced at the tariff amount, less the revenue-sharing percentage accruing to Matson. After approximately September 13, 1985, the Port began invoicing Matson directly for Showa's charges, again minus the revenue-sharing percentage accruing to Matson under Agreement No. T-3363. Upon receipt from the Port of invoices for Showa's storage obligations, Matson would submit the invoice to Showa, who would then pay Matson, which in turn paid the Port.

20. The practice of direct billing of Matson's carrier customers began in the early 1970's under a predecessor mini-max agreement between Matson and the Port. Under this agreement Matson's customers paid tariff charges owed as part of Matson's compensation obligation directly to the Port. When the maximum compensation owed to the Port by Matson was reached, the Port ceased billing Matson's customers for further tariff charges during the remainder of the term. Upon the advent of a "revenue-sharing" arrangement with the Port under Agreement No. T-3363, direct billing of Matson customers continued.

21. In 1982, Matson employees met with employees of the Port to discuss problems created by Port invoices being sent to wrong addresses of Matson's carrier customers. Matson and its customers were concerned about the accumulation of late charge penalties caused in part by mis-delivered invoices. A major cause of delay was confusion caused by the fact that Matson entities (e.g., Matson Navigation, Matson Agencies) were involved

in the billing transactions as carriers as well as agents for foreign-flag carriers. Matson therefore requested the Port to send invoices directly to its carrier customers (or their agents) at addresses provided to the Port by Matson.

22. In 1982, during negotiations for the second amendment to Agreement No. T-3363, the Deputy Executive Director of the Port, who was involved in the negotiations, was aware that the benefit derived from the revenue sharing provisions of the Agreement was being passed on by Matson to its carrier customers.

23. All invoices to Matson customers during the 1982-1987 period reflect the address of the Matson carrier customer or its agent. All invoices also reflect either accounting codes or verbal references to Matson. These codes and references were used by the Port's accounting personnel to identify the transaction as one relating to Matson's compensation obligation to the Port.

24. Had Matson not been party to a revenue sharing agreement with the Port of Los Angeles and had instead paid the Port compensation for the Matson Terminals facilities based on the full application of Port tariff charges, Matson would have paid the Port approximately $78,704,679 in compensation during the July 1, 1982 to May 15, 1987 period. Because of the application of the revenue sharing provisions of Agreement No. T-3363, Matson (or its carrier customers) instead paid approximately $35,218,303 in compensation to the Port for the use of Matson facilities during the period. Hearing Counsel maintain that those monetary amounts represent an underpayment of tariff charges by Matson's carrier customers.

25. Hearing Counsel estimates (and respondents, for purposes of this proceeding, accept) that approximately 92 percent of the $78,704,879 estimate stated in the preceding paragraph is allocable to wharfage charges (as opposed to charges for dockage, wharf storage, and demurrage). Hearing Counsel further estimate that charges for dockage constitute approximately two percent of the total amounts stated.

In addition to the above facts, each of the parties allege they would be able to prove additional facts in support of their respective positions. Hearing Counsel states it intended to establish that:

> (a) The terms of Agreement No. T-3363 provided that the rates and charges in the Port's Tariff govern charges at the Matson terminal, and, moreover, required Matson to charge and collect the Port Tariff charges from its common carrier customers.
>
> (b) Matson had terminal service agreements with its carrier customers, but those agreements did not modify or deal with, in any manner, the assessment of charges for wharfage, dockage, wharf demurrage, wharf storage, or any other Port tariff charge. The agreements instead governed stevedoring services and certain specified terminal services, none of which were services for which Port Tariff charges applied under Agreement No. T-3363.
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> (c) Agreement No. T-3363 required the Port to bill Matson for the Port's compensation at specified percentages of the Port Tariff charges collected by Matson.
>
> (d) Contrary to Agreement No. T-3363, Matson consistently failed to charge and collect Port Tariff charges from its common carrier customers throughout the relevant period. [Footnote notation omitted.]
>
> (e) The Port knew that Matson was charging and collecting less than Port Tariff charges from its common carrier customers, and actively participated in the undercharging by billing the carriers directly for its compensation, even though such billing procedures

were contrary to the terms of Agreement No. T-3363. The Matson terminal was the only terminal facility at the Port whereby carriers calling at a terminal were billed directly by the Port or paid the Port directly. The Matson Terminal was also the only terminal facility at the Port whose carrier customers paid less than Port Tariff charges.

(f) Agreement No. T-3363 required that Matson pay late charges to the Port in the event of untimely payments, but, instead, the carriers paid late charges to the Port.

(g) Matson published Terminal Tariff No. 8, FMC-T No. 2 ("Terminal Tariff") which specified wharfage charges at the Matson terminal; it was effective continuously throughout the relevant period. By its terms, the Terminal Tariff applied only to Matson Navigation Company, Inc. ("Matson Navigation") with respect to the carriage of automobiles and breakbulk cargo, and the rates it contained were the same as those in the Port Tariff.

(h) The rates published in the Terminal Tariff were the same as those in the Port Tariff and consistent with the requirements of Agreement No. T-3363, yet Matson failed to assess and collect those rates.

On the other hand the Respondents contend they could establish:

(a) That the actions alleged by Hearing Counsel to be violations of the Shipping Acts (i.e., the direct billing of Matson's carrier customers by the Port, Matson's charging of rates different from those stated in the Port of Los Angeles Tariff No. 3, and the payment of late charges to the Port by Matson's carrier customers) are in no way prohibited by the terms of the Matson/Port berth assignment agreement (Agreement No. T-3363) and are of no significance to the regulatory scheme established by the Shipping Acts.

(b) That the Port Tariff does not govern (either by its own terms or because of the provisions of Agreement No. T-3363) the level of charges Matson assesses its carrier customers for terminal services at the facilities Matson leases from the Port.

(c) That Matson's practice of providing terminal services to its carrier customers at rates which differ

from the Port Tariff relates to charges for wharfage, dockage, wharf storage, and wharf demurrage. These services and charges are expressly recognized by the Commission's regulations to be "terminal services." 46 C.F.R. 515.6.

(d) That the significance of the Port Tariff in the Matson/Port relationship is that it is the measure or standard by which Matson's compensation obligations to the Port are measured. In other words, Matson's "rent" obligations to the Port are determined by application of the rates stated in the Port Tariff to cargoes moving across the Matson terminal facility. These rental amounts are then reduced by percentages established in the "revenue-sharing" incentive provisions of Agreement No. T-3363. For the time period covered by this proceeding, these percentages were in the range of 45 to 50 per cent. All major marine terminal operators in the Port operate pursuant to similar revenue sharing agreements.

(e) That the level of charges to carriers using Matson's terminal facilities are governed not by the Port's Tariff, as is contended by Hearing Counsel, but by terminal service agreements between Matson and its carrier customers. This situation is not only true of Matson's provision of terminal services to its customers, but also describes a common and widespread method of establishing the level of charges assessed ocean carriers by marine terminal operators.

(f) That the Commission permits marine terminal operators to enter into terminal service agreements with carrier customers. This policy of the Commission applies with equal force to terminal service agreements that deviate from the landlord port's tariff.

(g) That although many marine terminal operators do not file their terminal service agreements with the Commission and/or do not reflect the level of charges pursuant to these agreements in the tariff format, Matson has routinely submitted its terminal service agreements to the commission for filing and approval. At all times covered by the period of this proceeding (i.e., 1982 through mid-1987), Matson's terminal service agreements with its carrier customers were either approved (under the Shipping Act, 1916) or had become effective (under the Shipping Act of 1984).

(h) That Matson's practice of charging its carrier customers for terminal services at rates other than those set forth in the Port's tariff is expressly contemplated by Matson's filed and approved terminal service agreements and pre-dates Agreement No. T-3363,

a document that Hearing Counsel contends requires the assessment of the Port's tariff charges against carriers calling at Matson terminal facilities.

(i) That Matson's terminal services agreement with Matson Navigation required that terminal services be assessed "at cost." This reflects the Commission's requirement in General Order 11 that all intra-company transactions of Matson Navigation be net of profit. Matson's terminal service agreements with its other customers were modeled on, and in some cases specifically referenced, the agreement with Matson Navigation. Matson's collection of full Port Tariff charges, as sought by Hearing Counsel, would result in an impermissible intracompany profit and would be contrary to Matson's terminal services agreements. Thus, Hearing counsel has sought to penalize Matson for abiding by a Commission requirement, and Commission-approved agreements.

(j) That to the extent Hearing Counsel bases its position on argument that Matson's terminal service agreements do not clearly reflect authority to charge carrier customers rates for terminal services that differ from the Port Tariff, Hearing Counsel is asserting in effect that Matson's practice of charging rates that differ from the Port Tariff are pursuant to unfiled agreements concerning the pricing of terminal services. Such unfiled agreements are covered by the Commission's Notices of Waiver of Penalties and are subsumed in the subject matter of the Commission's non-adjudicatory Fact Finding Investigation No. 17. In such a circumstance the Commission cannot lawfully assess penalties against Matson for activity related to the provision of terminal services to its carrier customers pursuant to unfiled agreements with those customers.

(k) That both the Port and Matson at all times intended (and interpreted their lease agreement to permit) that Matson would pass through to its carrier customers some or all of the revenue-sharing incentives accruing to Matson. This pass-through was essential to the enhancement of the competitive positions of the Port and Matson and to the stimulation of traffic growth at the Port.

(l) That the Port would not have agreed to a revenue-sharing provision in a lease agreement with Matson or any other terminal operator if the terminal operator did not intend to use the monetary benefits of revenue-sharing to enhance the competitive attractiveness of the facility in order to attract higher cargo volumes.

(m) Because the total throughput charge at Matson and other terminal facilities in Long Beach/Los Angeles includes amounts allocable to both the provision of regulated terminal services and unregulated stevedoring services, the total charge to carriers is large enough to exceed total tariff charges if such charges were directly assessed by the terminal operator. To the extent Hearing Counsel believes or contends that Matson was "the only terminal facility at the Port whose carrier customers paid less than Port Tariff charges," (see subparagraph (1)(e) supra), Hearing Counsel has mistaken form for substance. Like other terminal operators, Matson's total charges to its customers exceed 100% of the Port Tariff charges (if those charges were applicable). The difference between Matson and other terminal operators is that Matson allocates a higher proportion of its total charges to stevedoring services than it allocates to terminal services. There is no substantive difference (either in terms of price levels or in terms of regulatory analysis) between the rate practices of Matson and those of other terminal operators.

(n) That Matson and the Port have correctly interpreted Agreement No. T-3363 as not prohibiting direct billing of Matson's carrier customers or the charging of rates for terminal services that deviate from the Port Tariff is established by the following factors, all of which would be demonstrated at trial or on brief by respondents:

i. There is a high degree of competition between terminal operators in the Los Angeles/Long Beach port area. Like Matson, all terminal operators in the Los Angeles/Long Beach port area who have revenue-sharing agreements with the lesser ports use revenue-sharing benefits to offset the cost of providing terminal and stevedoring services to their carrier customers. Because terminal operators compete on the basis of total throughput charges (which include charges for unregulated stevedoring services), it is not meaningful to determine whether a terminal operator's application of revenue-sharing benefits offsets terminal service charges or offsets stevedoring charges. Respondents would, however, offer proof that competing terminal operators maintain throughput rates at levels that would be far below Matson's if Hearing Counsel's interpretation of Agreement No. T-3363 were applied. It is therefore unreasonable to conclude (as does Hearing Counsel) that Matson and the Port would have entered into an agreement that would have

required Matson to assess charges at its facility that would be significantly in excess of prevailing rates in the port area.

ii. Matson's practice of charging its customers rates different than those contained in the Port Tariff pre-dates Agreement No. T-3363 by many years. Under the predecessor lease agreement (Agreement No. T-2356, approved in 1969), a so-called "mini-max" agreement, Matson's rental obligations to the Port ceased when a specified monetary ceiling was reached on the collection of tariff charges at the facility. After that ceiling point was reached, Matson passed on to its carrier customers reductions in terminal charges resulting from the termination of rental payment obligations to the Port. Had Matson and the Port intended to halt this practice when Agreement No. T-3363 was negotiated in 1976 and 1977, there would have been some evidence of this intent. Any efforts by the Port to require Matson to deviate from its longstanding practice of billing its customers for terminal services at cost would have elicited strong protest from Matson at the time of the renegotiation of the agreement. There is no evidence of such efforts or protests.

iii. Matson and the Port cooperated fully in explaining their billing and collection practices to the Commission's investigator when he conducted his investigation in 1984 - 1985. Respondents were straightforward in describing the direct billing practices and the pass-through of the revenue-sharing to Matson's carrier customers. Had respondents felt that such actions were contrary to the terms of Agreement No. T-3363, they would not so readily have volunteered details of their practices in response to informal inquiries by a Commission District Investigator.

iv. Interpretation of Agreement No. T-3363 is governed by California law and generally accepted principles of contract interpretation. There is no evidence that the parties to the agreement ever questioned the meaning of the billing and collection provisions. Application of general principles of contract law support respondents' interpretation of their own agreement. These principles are:

> a. Contracts should be interpreted in a manner that favors a lawful, reasonable, and effective interpretation over interpretations that would render the contract unlawful,

unreasonable or ineffective. This principle favors Respondents' interpretation of their agreement over that of Hearing Counsel.

b. Contracts may be interpreted by reference to circumstances under which they were made and the matters to which they relate. This principle favors Respondents' interpretation of their agreement over that of Hearing Counsel.

c. Acts of the parties, subsequent to the execution of the contract and before any controversy has arisen as to its effect, may be looked to in determining the meaning of the contract. The conduct of the parties may constitute a practical construction of the contract because the parties are least likely to be mistaken as to their intent. This principle favors Respondents' interpretation of their agreement over that of Hearing Counsel.

(o) That well over 95 per cent of all terminal service charges that are the subject of this proceeding are charges against cargo interests, not against Matson's carrier customers. Contrary to Hearing Counsel's theory that Port tariff charges are in some way being avoided, Respondents would prove that the normal method of collection of charges against cargo was for the ocean carriers to assess such charges through their own carrier tariffs. Hearing Counsel can offer no evidence that cargo interests did not pay all tariff charges properly applicable to cargo at the Matson facility. There can be no Shipping Act violation attributed to Matson or the Port for "failure to collect" wharfage, wharf storage, or wharf demurrage from carriers. The carriers are not liable, either by terms of the Port Tariff or by the terms of Agreement No. T-3363, for the payment of such charges.

(p) That even if Hearing Counsel could convince the Administrative Law Judge or the Commission that Respondents' interpretation of their agreement is incorrect, the underlying actions of Respondents are of no Shipping Act significance. This proceeding presents a case of first impression as to whether there can be a violation of section 15 of the Shipping Act, 1916 or section 10(a)(3) of the Shipping Act of 1984 where the actions alleged to have not been authorized by the agreement <u>do not</u> implicate any other sections of the Shipping Acts and have no antitrust significance. Absent allegations of any violations of law other than mere failure to adhere to the billing and collection

practices that Hearing Counsel reads into the provisions of Agreement No. T-3363, Hearing Counsel cannot establish a basis for a finding of violations or the imposition of penalties.

(q) That Respondents would offer proof that Matson's overall level of charges is either identical to or higher than the level of charges at other terminal facilities.

(r) That Matson's Terminal Tariff No. 8 (FMC-T No. 2), cited by Hearing Counsel at sub-paragraphs (1)(g) and (1)(h) of this section, has nothing to do with the subject matter of this proceeding. No tariff issues were raised in the Order of Investigation. This tariff is applicable only to automobiles and non-containerized cargoes with prior or subsequent movements aboard Matson Navigation vessels.

(s) Matson's Terminal Tariff No. 8 does not apply to carriers at the Matson terminal facility, but instead applies to cargo interests.

(t) That, contrary to Hearing Counsel's contention at paragraph (1)(h) of this document, all charges incurred pursuant to Terminal Tariff No. 8 were collected from cargo interests.

(u) That the practices of Matson and the Port were well understood by Matson's carrier customers and marine terminal operators in the Los Angeles/Long Beach area.

(v) That in June 1985, counsel for Matson provided a letter to the FMC District Investigator confirming certain factual information offered to the Investigator by Matson and Port personnel between November 1984 and May 1985. The June 1985 letter explained that Matson viewed its actions as being consistent with Agreement No. T-3363 and required by its terminal service agreement with its customers. After the conclusion of the commission's investigation Matson was advised, by way of a Notice of Demand for Civil Penalties dated March 23, 1987, that Matson's actions were considered unlawful. This notice of civil penalties was the first communication regarding Matson's practices at the Port that was received by Matson from the Commission following the June 1985 letter from Matson's counsel. Therefore, should this proceeding go to hearing, Matson would argue that even if the Commission rejects all arguments raised in Respondents' defense, penalties should not be assessed for actions of Respondents between June 1985 and March 1987.

Discussion

The Administrative Procedure Act (5 U.S.C. 554(c)(1) ("APA") requires agencies to given interested parties an opportunity to submit offers of settlement, "when time, the nature of the proceeding, and the public interest permit." Congress intended the provision to be applied liberally stating:

> . . . even where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason do do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication . . . . The statutory recognition of such informal methods should strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations.

Senate Committee on the Judiciary, Administrative Procedure Act - Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 24 (1946).

It is well-settled that courts generally favor settlements, including those coming under the APA provision. Pennsylvania Gas and Water v. Federal Power Commission, 463 F.2d 1242, 1247 (D.C. Cir., 1972).

The Commission, too, has long recognized and applied the law favoring settlements. In Old Ben Coal Company v. Sea-Land Service, Inc., 21 F.M.C. 506, 512 (1978), 18 SRR 1085, 1092, it stated:

> . . . the law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy . . . . The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts and it is thus advantageous to judicial administration, and, in turn, to government as a whole.

See also Del Monte Corp. v. Matson Navigation Co., 22 F.M.C. 365 (1979), 19 SRR 1037, 1039; Behring International, Inc. Independent Ocean Freight Forwarder License No. 910 (Initial Decision, March 17, 1981, administratively final June 30, 1981), 20 SRR 1025, 1032-33.

Not only has the Commission followed a policy of favoring settlements, but it has approved settlements of administrative and investigative proceedings even when, as here, there has been no admission or finding of violations of the Shipping Act. Eastern Forwarding International, Inc. - Independent Ocean Freight Forwarder Application - Possible Violations, Section 44, Shipping Act, 1916 (Initial Decision, July 30, 1980, administratively final September 8, 1980), 20 SRR 283, 286 ("Eastern"); Far Eastern Shipping Co.--Possible Violations of Sections 16, Second Paragraph, 18(b)(3), and 18(c), Shipping Act, 1916 (Initial Decision, March 25, 1982, administratively final May 7, 1982); 21 SRR 743, 764 ("FESCO"); Armada Great Lakes/East Africa Service, Ltd.; Great Lakes Transcaribbean Line (Initial Decision, March 21, 1986, administratively final April 25, 1986), 23 SRR 946, 949 ("Armada"); Member Lines of the Transpacific

Westbound Rate Agreement - Possible Violations of the Shipping Act of 1984 (Initial Decision, August 27, 1986, administratively final October 9, 1986); 23 SRR 1329, 1340 ("TWRA").

In approving proposed settlements the Commission has set forth those standards which it considered appropriate. They were summarized in FESCO, supra, as follows:

> . . . settlement may be based upon a determination that the agency's "enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon"; that "the amount accepted in compromise . . . may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection"; the value of settling claims on the basis of pragmatic litigative probabilities, i.e., the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts; and that penalties may be settled "for one or for more than one of the reasons authorized in this part."

The relationship between the criteria for assessment of penalties and the criteria for approving settlements is summarized in Armada, supra, 23 SRR at 956, as follows:

> As seen, Section 13(c) of the 1984 Act and §505.3 of the Commission's regulations, which implements both Section 13 of the 1984 Act and Section 32 of the 1916 Act, explicitly set forth criteria for assessment of penalties, and while they do not directly address the criteria for settlement of penalties, I believe the latter are subsumed by the former. This is manifest from the history of the settlement process at the Commission.
>
> Section 32(e) of the 1916 Act was enacted in 1977. [Footnote omitted.] The rules and regulations implementing Section 32(e) were promulgated and published by the Commission in a predecessor version of 46 CFR §505, in 1979. Under those rules the "criteria for compromise, settlement or assessment" might "include but need not be limited to those which are set

> forth in 4 CFR Parts 101-105." . . . Those standards, particularly, the standards enumerated in 4 CFR §103, were a part of the Commission's program for settlement and collection of civil penalties even before the authority to assess penalties was given the Commission pursuant to Section 32(e). More to the point, it was held that those standards provided criteria for both settlements and assessments. "They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings." [citing Eastern and Behring International, Inc., supra.]

See also Marcella Shipping Co. Ltd. (Initial Decision, February 13, 1986, administratively final, March 26, 1986), 23 SRR 857, 866.

In view of all of the above, it remains for the undersigned, under the authority of 46 CFR 502.3(a), to decide whether or not the Settlement should be approved. In applying the appropriate criteria to the Settlement involved here it is necessary to balance agency enforcement policy in terms of deterrence and securing future compliance, litigative probabilities, litigative and administrative costs, and such other matters as justice may require. As to deterrence the Joint Memorandum states that "Hearing Counsel believe that providing a deterrent effect is essential in the resolution of this proceeding" and that "The monetary payment provided for in the Offer is substantial and achieves the desired deterrent effect."

As to litigative probabilities the parties agree that, "although all parties are confident of prevailing at a hearing, the outcome of any litigation is uncertain. The inherent uncertainty of any litigative situation was a factor which led to

the proposed settlement agreement." The parties also both agree that "The cost of litigating this matter would be substantial," that "the hearing had been scheduled to last approximately two weeks," and that witnesses "would have to travel from distant locations." They concluded that "The offer (Settlement) would save all parties time and money, and minimize Respondents' and Hearing Counsel's legal expenses." (Parenthesis supplied.)

Conclusions

After considering the entire record, the Settlement is hereby approved. As to the money payments involved, Matson has agreed to pay $69,000.00 and the Port of Los Angeles ("Port") $46,000.00, both plus accrued interest. These amounts are deemed reasonable bearing in mind that (1) Hearing Counsel "would not argue that the 'knowing and wilful' provisions of the Shipping Acts should be implemented with regard to the amount of penalties that should be assessed," (2) the parties agree "that the record of this proceeding does not show competitive harm to other ports, terminal operators or carriers as a result of actions of Respondents," and that (3) the parties agree "that the practice of direct billings of carrier customers of tenant terminal operators by the Port of Los Angeles would not necessarily result in violations of the Shipping Acts." Further, it is held that the Settlement properly balances the interests of the government and the Respondents in light of the facts and issues presented.

One other aspect of this Settlement requires some discussion and clarification. It involves the question of future compliance

with the terms of the Shipping Act. While, as has been noted above, the original settlement proposal spells out the monetary payments, the deterrent aspect and the cost of litigation, it does not indicate whether or not the Settlement eliminates the conduct that gave rise to the issues involved in the first instance. To clarify this question the parties were asked whether or not the Respondents are continuing the practices at issue in this proceeding. In response to the inquiry the parties filed a Supplemental Stipulation which explains what has transpired. It indicates, among other things, that on March 11, 1987, Matson and the Port entered into a new preferential berth agreement which replaced Agreement No. T-3363 and its amendments. The new agreement was filed with the Commission on May 15, 1987, as Agreement No. 224-011088. Section 4(a) of Permit No. 587, which is a "revenue-sharing" agreement and part of the new Commission filing, now explicitly provides that Matson need not collect from its customers tariff charges which exceed the amount Matson pays the Port, if terminal service agreements between Matson and its customers so provide. With respect to the new agreement the Supplemental Stipulation states:

> Hearing Counsel and Respondents agree that the current practices of Matson and the Port thus differ in two significant respects from those that were the subject of the Commission's Order of Investigation. First, the pass-through of Matson's revenue sharing benefits to its carrier customers through terminal service agreements is expressly authorized by Permit No. 587. Second, the Port is no longer directly billing Matson's carrier customers for terminal charges due the Port. Instead, the port bills Matson, Matson invoices its customers, the customers pay Matson, and Matson pays the Port.

Because Permit No. 587 explicitly authorizes tariff deviations and the billing and collection practices at the Matson facility have been modified, the issues of contention in this proceeding no longer exist. Hearing Counsel and Respondents agree that there is no evidence that current practices fail to comply with Permit No. 587, and that no enforcement objective would be served by continuing this Investigation with regard to current practices.

Order

In view of all of the above it is hereby,

Ordered, that the Settlement be approved and that its terms are incorporated in this paragraph as if more fully set forth herein. The payment of monies provided for in the Settlement shall be effected no later than thirty (30) days after service of the Commission's final decision.

Joseph N. Ingolia
Administrative Law Judge

Washington, D.C.
October 3, 1988

(S E R V E D)
(November 7, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 87-15

COMPLIANCE WITH AGREEMENT NO. T-3363 BETWEEN
CITY OF LOS ANGELES AND MATSON TERMINALS, INC.

NOTICE

Notice is given that no exceptions were filed to the October 3, 1988, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

Joseph C. Polking
Secretary